

APPEAL NO. 040183  
FILED MARCH 1, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 30, 2003. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on September 4, 2002, with a 4% impairment rating (IR) as certified by the Texas Workers' Compensation Commission (Commission)-appointed designated doctor, Dr. K. The claimant appealed, asserting that Dr. K's MMI and IR certifications are incorrect, that the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) were not properly applied, and that she was not afforded due process. The claimant requests that the statutory MMI date and the treating doctor's IR certifications be adopted. In the alternative, the claimant is requesting that a second designated doctor be appointed. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The claimant testified that she slipped and fell on a wet floor and injured her right fifth finger, both knees, and lower back. The claimant underwent surgery to repair a fracture to her right fifth finger on August 6, 2001; a partial lateral and medial meniscectomy to her right knee on February 13, 2002; and a partial lateral and medial meniscectomy to her left knee on February 10, 2003. An MRI of the lumbar spine dated November 9, 2002, reflects no disc herniations or central spinal canal stenosis.

The treating doctor, Dr. T, examined the claimant on September 4, 2002, and reported that the claimant reached MMI on that date, with a 30% IR. Dr. T used the AMA Guides in assessing the IR. Dr. T assessed a 10% whole person impairment of the right upper extremity, 5% whole person impairment of the lumbar spine, 9% whole person impairment of the left knee, and 9% whole person impairment of the right knee, for a combined whole person impairment of 30%. With regard to the lumbar spine, Dr. T opined that the claimant had no radicular symptoms and that the MRI results showed no disc or neural impingement, and assessed a 5% impairment for a minor injury under Diagnosis-Related Estimate (DRE) Lumbosacral Category II of Table 72 of the AMA Guides. With regard to the knees, Dr. T calculated a right knee flexion of 115 degrees and a left knee flexion of 124 degrees. Dr. T opined that the "bilateral knees both are estimated to be mild in terms of loss of [range of motion (ROM)] (4%)" under Table 41, and that the claimant's "strength impairment of the lower extremity was estimated at (5%)," for a combined whole person impairment of 9% for each knee.

The carrier's doctor, Dr. O, reviewed Dr. T's assessment of the claimant's IR on September 19, 2002. Dr. O used the AMA Guides and opined that the claimant's IR is 8%, based on 3% impairment for the right fifth finger, 5% impairment for the lumbosacral, under DRE Lumbosacral Category II of Table 72, and 0% impairment for both knees. With regard to the knees, Dr. O opined that both right and left flexion was greater than 110 degrees, thus the claimant's impairment is 0%, under Table 41.

The designated doctor, Dr. K, examined the claimant on November 22, 2002, and certified that the claimant reached MMI on September 4, 2002, with a 4% IR. Dr. K used the AMA Guides and he assessed a 3% impairment for the right fifth finger, a 6% impairment for right-hand dominant, 0% whole person impairment for the lumbar spine, and 0% whole person impairment for both knees, under Table 41, for a combined whole person of 4%. With regard to the lumbar spine, Dr. K explained that the "[m]easurements of the lumbar spine were obtained times three using the dual inclinometer method. There was no loss of [ROM], therefore, she would fit into DRE Category I, [Table 71] Page 3/106, which gives a 0% impairment." With regard to both knees, Dr. K explained that the ROM for both knees was greater than 110 degrees; therefore her impairment was 0%, under Table 41.

In a medical report dated December 10, 2002, Dr. T reassessed the claimant's IR. Dr. T assessed a 9% IR for the right knee and lumbar spine, and by addendum reassessed a 19% IR for the lumbar spine, right knee, and right hand. With regard to the IR for the lumbar spine and right knee, Dr. T certified that the claimant reached MMI on December 10, 2002, with 9% IR, based on a 5% whole person impairment for the lumbar spine under Table 75, Section (II)(B), a 10% impairment for the lower extremity, as a result of medial and lateral meniscectomies under Table 64, and "4% whole person impairment as a result of these knee cartilage injuries," for a combined impairment of 9%. In the addendum, Dr. T reassessed the hand injury. Dr. T assessed a 19% IR based on a 10% whole person impairment for the right hand, and 9% whole person impairment for the lumbar spine and right knee, for a combined whole person IR of 19%. In a medical report dated March 4, 2003, Dr. T recertified that the claimant reached MMI on December 10, 2002, for her lumbar and right knee injuries, and that she reached MMI on January 13, 2002, for her right fifth finger. Dr. T reassessed the claimant's IR to be 16%.

On March 10, 2003, the Commission sent a letter of clarification to the designated doctor, Dr. K, based on the treating doctor's, Dr. T, recertification of MMI and assessment of IR. In a letter dated March 12, 2003, Dr. K responded that he stood by his previous opinion.

In evidence is a letter from Dr. T dated April 17, 2003, in which he reassessed the claimant's IR to be 40%, for the right hand, lumbar spine, and right knee injuries. In evidence is another letter from Dr. T dated April 24, 2003, in which he recertified the claimant's MMI on that date, and reassessed the IR to be 19%, for the right finger, lumbar spine, right knee, and left knee.

On April 30, 2003, the Commission sent a second letter of clarification to Dr. K indicating that the claimant contends that she reached statutory MMI on April 24, 2003, and requesting that he review an operative report of a partial lateral and medial meniscectomy to the left knee performed on February 10, 2003. In a letter dated May 7, 2003, Dr. K responded that he reviewed the additional records, and that he would not alter his previous impairment rating.

On October 7, 2003, the Commission sent a third letter of clarification to Dr. K indicating that the AMA Guides mandate that an IR be assessed for meniscectomies under Table 64. In a letter dated December 5, 2003, Dr. K responded that he calculated right and left flexion to be greater than 110 degrees and the left and right extension to be less than 5 degrees, therefore he assigned a 0% IR according to Table 41. In addition, Dr. K cited page 3/84 of the AMA Guides, which states, "The [evaluating] physician must determine whether diagnostic or examination criteria best describe the impairment of a specific patient. *The physician, in general should decide which estimate best describes the situation and should use only one approach for each anatomic part.*" Dr. K opined that in his professional judgment, the examination method best described the IR for the knees. Dr. K stated "that there was no reason to question the finding of MMI and [he had] no documentation that [the claimant] was not [at] MMI on the previously agreed date." Dr. K assessed that the claimant's IR was "determined to be 4%, based on lumbar spine 0%, knees 0%, and right fifth finger 4%."

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that, if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion.

The hearing officer found that the presumptive weight accorded to the designated doctor's opinion has not been overcome by the great weight of contrary medical evidence. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to the claimant's request to appoint a second designated doctor, the Appeals Panel has held that a designated doctor should not be replaced by a second designated doctor absent a substantial basis to do so, and that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or

requests from the Commission for clarification, or if he or she otherwise compromises the impartiality demanded of the designated doctor. Texas Workers' Compensation Commission Appeal No. 011607, decided August 28, 2001. The Appeals Panel noted in Appeal No. 011607 that in limited cases, the hearing officer has the option of going back to the designated doctor for a second or third clarification, or to adopt the IR of another doctor which is valid, or to consider the appointment of a second designated doctor, if it was determined that the designated doctor was unable or unwilling to comply with the AMA Guides.

With regard to the claimant's contention that she was not afforded due process, review of the record does not establish a denial of due process or reversible error in this regard.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **GREAT AMERICAN ALLIANCE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

---

Thomas A. Knapp  
Appeals Judge

CONCUR:

---

Judy L. S. Barnes  
Appeals Judge

---

Chris Cowan  
Appeals Judge